Rights Protection Mechanisms (RPMs) PDP Working Group Notes/ Action Items
15 November 2017

Action Items:

1. Recirculate slides from the first URS session at ICANN60.
2. Create a table with the questions; proposed edits/comment/clarification; provide context; new questions. Add reference to the part of the URS.

Notes:

1. Updates on Statements of Interest:

Phil Corwin: Joined Verisign as Policy Counsel; left private practice. Updated SOI.

2. Review of URS Charter Questions:

General Discussion/Overview:

-- Don't go back to a sub team for this. Review the questions in the full Working Group.

-- Question: Is this the opportunity to raise comments/questions? Some of the questions/edits seem like they need context. Response: This is the time to provide edits.

-- Think about opening up discussion on the email list or next call and give ourselves a goal, but give people sufficient time to get their heads around these questions.

-- Following the same process -- create a table (see action above).

-- One concern: If we do this in plenary it might be unwieldy. Is this the most efficient way forward?

-- We are in phase 1 of our work and we need to check on the status of the data analysis, but that will be awhile. That means that we have time that we can devote to URS. It could be that those who are interested could be on WG calls, which might then be like a sub team. But we still need to think about the best way to proceed -- full WG or Sub Team.

-- A lot of these questions were raised and answered between the years of 2009 and 2012. Concerned that we would re-litigate these as opposed to relying on actual cases that show there is an issue. It is important for context as why something is the way it is.

-- We should be reviewing the existing rules and from there look at what the problems are and think about the solutions.

J. Scott: I think Jeff is saying that we need to identify a problem caused by the current policy. If it is simply, we do not like the policy or a part of the policy as written then we do not need to re-negotiate.

Slide 4 (1 of 5 of charter questions):

-- The standard is there because URS is there for black and white cases. More interested to know if the accredited providers are following the standard. If they are then it wouldn't seem to be a barrier. Focus more on identifying problems or failures to adhere.

-- Question 1 on slide 1 of 5: URS filed, short reply period, no response -- there is a determination against the registrant: Is it after 1 year after filing the URS? Let's say after 10 months what is the effect of filing this reply? What is the practical effect of this?

-- WIPO - Brian Beckham: @J Scott: perhaps it should be broken up into different questions?

-- Are we also at this stage providing additional questions under this category? Yes, we can provide additional questions for evaluation of the Working Group.

-- One of the things that we worked on with other charter questions we tried to keep the original question but suggesting an alternative question that was more neutral. The second question on the slide is not neutral. Flag the exercise of neutrality that is required.

-- Might be helpful to know which part of the URS is referenced, for context.

-- Potential scope issue: Could be a mechanism to address abusively registrered names that aren't identical or similar to trademarks.

"Should the first element be modified to include names that are abusively registered but that may not be confusingly similar or identical."

-- Do we want to go through all the question and then put them into buckets on what issue they are trying to address. Then refine those intro neutral questions that will get us information that will allow us to have solutions. These were just scooped up and come with points of view. It is our job to decide what we are trying to solve for. Looks like staff created buckets? Okay to work with them if the consensus is they are fine.

-- So, more neutral question 1 (slide 1 of 5) is "Should the timing mechanism be changed?" Try to get to the heart of what the question is asking.

-- In the context of the URS and the standard of proof not sure we should leave it to a developing body of jurisprudence or add a clarification as to whether or not allegations are entitled to any weight. Even if the standard of proof is clear and convincing is there any weight to an allegation that goes uncontested. The way it is treated now is inconsistent at best.

-- New question: Related to standard of proof -- there is a provision in the URS for abusive complaints that are filed and if there are over 3 filed there might be restrictions on the trademark owner to file further complaints. Should there be something similar for registrants who might be abusively registering domains. One compromise proposal was shifting the burden of proof to the respondent to meet the burden of proof.

Slide 2 of 5:

-- New question/issue: One of the assumptions of the URS and UDPR is that either side can go to court and that the URS and UDRP don't create new laws. There is an underlying assumption that both sides can go to court. In UK and Australia there have been isolated cases that the respondent has no right to appeal. But per the URS/UDRP the respondent has not need for new rights (to appeal). The question is, "what to do if the court determines that there is no right to appeal the URS/UDRP decision?" Investigate if this is a problem and then how to handle it.

-- Note: We aren't talking about UDRP at this phase. For URS make federal courts in US as the jurisdiction.

-- ICANN has no power to create those rights in other jurisdiction. You can get the right if you use a US-based registrar. I would be wary of making US-based courts available for all registrants.

-- One the first bullet/question: Suggest changing it so it reads, "should the URS allow for additional remedies" and change "perpetual block" to "indefinite suspension". There is repetition in the way it is phrased, repeats "remedies" twice.

Slide 3 of 5:

-- On the first question there are precursors -- Is there any evidence of misuse of the URS by trademark owners. There are sanctions in URS for abusing. So the question should be "what additional sanctions"? There are assumed precursors.

-- On the last question: the specificity with regards to IDNs is relatively minor. The more significant matter is [...]

Slide 4 of 5:

-- Questions that are trying to stick with existing policies, i.e., are providers doing their jobs?

-- Broader question: under which jurisdiction so providers be terminated/unaccredited?

-- The second and third questions ask about processes and procedures -- on their own these could be fair questions but would be good to know if these were directed at a particular process/issue.

-- On the final two questions: There needs to be some degree of recognition that some degree of deference is warranted with respect to its internal procedures.

-- Is there a difference between looking broadly rather than micromanaging on how they are implementing?

-- Not sure it is our job to review URS providers. Not sure it is our place to be the compliance team. That is ICANN's job. It is our job to see if the URS is working.

-- The original GNSO recommendation did call for providers to be under formal contract with ICANN. Would like to find out the rationale.

-- Ascertain if they are in compliance with the MOU and that it is being administered consistent with the framework set forth by the community. Overarching question whether at the end of phase 1 whether the WG will recommend any of the RPMs to become consensus policy, such as the URS.

-- New questions: "To what extent is the forum shopping of URS providers?" and "Whether the current practice of the complainant choosing the URS provider or the respondent to reduce forum shopping?" Or "is there a problem with the existing rules that results in forum shopping?"

-- Could be out of scope to review URS providers for compliance? If we do decide to go down this path we need to take a really good look at these questions as some are loaded.

From the Chat room:
Mary Wong: @Kristine and everyone - as noted previously, these are basically all the suggestions received from comments without any further edits from the Council
Kristine Dorrain - Amazon Registry Services: Yes, for sure Mary
George Kirikos: Are burdens shifted in court when parties have lost cases previously? Methinks not.
Kristine Dorrain - Amazon Registry Services: Just flagging "same problem" :)
Paul Tattersfield: Good question
Griffin Barnett: @Jon, good question; we can probably address this in connection with the remedies question(s)
Kristine Dorrain - Amazon Registry Services: Agree, Susan, our edits column needs to not only address context, but also neutrality
Paul McGrady: +1 Susan. The questions can't presuppose the answers to the unasked questions.
Kristine Dorrain - Amazon Registry Services: Charter questions should be neutral.

Susan Payne: we want to edit
Susan Payne: we spend months editing previously - possibly too long. But no editing at all misses the balance entirely
Maxim Alzoba (FAITID): I am not sure similarity could be checked via a cheap simple process
Kristine Dorrain - Amazon Registry Services: Agree with Susan. Whether we call this "the WG" or a "subteam", we cannot skip the editing step.
Kristine Dorrain - Amazon Registry Services: If people don't want to do that, they need to skip a few calls.
Paul McGrady: Agree. Let's get them organized and then clean them up to be nuetral and clear.
Mary Wong: @J Scott, @Kristine and everyone - presumably this exercise should not only clarify the actual questions but also fill in gaps if needed (as per the other Sub Teams for the other RPMs)?
J. Scott: We could take a look at the suggested edits each week and come to consensus.
Cyntia King: +1 J Scott
WIPO - Brian Beckham: Yes, agree Mary, we should have the opportunity to add questions, as needed
George Kirikos: Yes, the recent 3-letter .com default cases have helped highlight this issue.
George Kirikos: (in the UDRP)
Kristine Dorrain - Amazon Registry Services: Agree Mary. I am advocating strongly (since my first comment today) that we repeat the SAME process we've used previously.
J. Scott: @Mary and Brian. I agree. We can edit the current questions for clarity and neutrality and add any additional questions the group feels are need to fill gaps to cover the issue identified.
Susan Payne: @Kristine -= me too
Paul McGrady: @Kathy - very useful exercise
Susan Payne: @Kathy, well there were various comments in AD about the Qs, but since these are the same slides those comments haven't yet been incorporated. When we have our grid it can capture feedback from both sessions
Susan Payne: You can seek a declaration of non infringement in the UK George
WIPO - Brian Beckham: An example of what I meant earlier: this third bullet asks "how" the appeals process can be "expanded" without asking whether it should be, and if so, why (and what does "expanded" mean anyhow?)
Griffin Barnett: +1 Brian...maybe just "improved"
Maxim Alzoba (FAITID): a simple village court hearing halts URS ...
Jon Nevett: I'm putting this back in chat b/c the question might be more applicable here -- One related issue to add please is whether an unsuccessful registrant should be able to renew the domain name (unlimited renewal or just during an appeal)
Michael R Graham: My Chat is not opeating correctly -- it is still congratulating Phil -- which is great, but misses the postings.
Susan Payne: We are dealing with the URS here. Not the UDRP. Just to be clear
Griffin Barnett: @Claudio: what would be the practical difference between a perpetual suspension vs. perpetual block?
Kristine Dorrain - Amazon Registry Services: @Julie, just flagging Jon's question above for the notes - I can see you're typing like mad...

WIPO - Brian Beckham: In terms of appeals questions, we may want to consider a question to address the potential for gaming, as was raised in the past in the UDRP context: http://www.wipo.int/amc/en/docs/icann090409.pdf
George Kirikos: The right to appeal to the courts affects BOTH the UDRP and the URS.
Griffin Barnett: +1 Paul - let's just focus on URS now. Might be same issues again during UDRP review, but it's not what we are doing now.
George Kirikos: So, now is the time to do it.
Julie Hedlund: @Kristine: I'll be reviewing the chat for questions to add too -- can't keep up ;-)
Julie Hedlund: As you can see.
Kristine Dorrain - Amazon Registry Services: I know! you're amazing.
Paul Tattersfield: Can URS not be appealed?
Griffin Barnett: OK to raise the issue now as it relates to URS, but let's not conflate the two
Griffin Barnett: URS absolutely can be appealed
George Kirikos: @Griffin: it affects them both identically.
Griffin Barnett: @George, that's fine if that's the case, but let's just focus now on the issue w/r/t URS
Kristine Dorrain - Amazon Registry Services: domain name cases are filed de novo....they're not really an appeal, which is a review of a lower court's determination.
Maxim Alzoba (FAITID): explicit use of a particular jurisdiction needs to be justified
WIPO - Brian Beckham: For the fourth bullet, the cost allocation question, is this meant to cover a possible (ICANN, contracted party, etc.?) subsidy, e.g., as in the eBay VeRO program?
Griffin Barnett: @Kristine, fair point
Mary Wong: @Brian, all - if it helps, and possibly for specific questions, staff can go back and retrieve the origin of those questions for context.
Griffin Barnett: Under URS tho there is a specific appeal mechanism, which remains within the domain dispute system
George Kirikos: If we're going to make recommendations about the URS before we get to the UDRP, then this still needs to be studied in the context of the URS.
WIPO - Brian Beckham: For the second bullet, how do we judge the "sufficiency" of the suspension?
Kristine Dorrain - Amazon Registry Services: @ Brian, I suggest (based on how we handled this before) asking: what evidence is there that the current term is too long or not long enough? To Jeff's point, we're looking for problems, If there are none, then the answer is "yes, it's sufficient."
claudio: @Julie, here is my suggested tweak: "Should the URS allow for additional remedies, such as a perpetual suspension, block, or a "right of first refusal" to register the domain name in question?"
Kristine Dorrain - Amazon Registry Services: I'm a supporter of the Neuman rule
Julie Hedlund: @Claudio: Thanks!
Kristine Dorrain - Amazon Registry Services: @Claudio, I'll push back...your question again is subjective. Should we do x.
Kristine Dorrain - Amazon Registry Services: Let's start with "what are the problems...."
Justine Chew: +1 Kristine, and absolutely agree with what Jeff is saying.
George Kirikos: Not in agreement.

claudio: @kristine, I used should because that's how the question is currently framed, but agree
George Kirikos: Bad past decisions should be reviewed.
Paul Tattersfield: George +1
Kristine Dorrain - Amazon Registry Services: @George, past bad decisions can and should be evidence of some of the bad things we're trying to address. Those should be considered.
George Kirikos: Zero-based budgeting. Start from zero.
J. Scott: I think Jeff is saying that we need to identify a problem caused by the current policy. If it is simply, we do not like the policy or a part of the policy as written then we do not need to re-negotiate.
Paul McGrady: An identifiable problem must proceed a decision to rethink a certain provision of the RPMs. No problems = high fives and moving on.
George Kirikos: Perhaps removing those people who were part of the past policy should recuse themselves from the discussion? Since they might be biased in favour of the status quo.
Jeff Neuman: @George - perhaps those that have criticized the policy from the beginning should also recuse themselves :)
Paul McGrady: preceed. :)
Griffin Barnett: Not a very fair multi-stakeholder approach George
Paul McGrady: darn. precede. I'm not tired...
Paul McGrady: [sic]
Gary Saposnik: Paul- are U.S Federal Courts to be "the" jurisdiction, or "a" jurisdiction alternative?
Paul McGrady: @Gary "a" jurisdiction. The other two would be the home of the registrar and the home of the registrant.
claudio: @Jeff, agree w/ problem aspect, one distinction on the other issue is that the new gTLD policy went through a full PDP, whereas these RPMs did not
Gary Saposnik: Paul- +1- the notes indicated "the"
Phil Marano: Lack of robust use of the URS might be attributable to the higher evidentiary standard, or other aspects of the URS. So it might be tough to foreclose those types of questions out of the gate absent pertinent data.
Maxim Alzoba (FAITID): US courts litigation cost is prohibitive for the developing world companies
Kristine Dorrain - Amazon Registry Services: @Phil....feature or flaw? :)
Kristine Dorrain - Amazon Registry Services: (that's Phil M)
Maxim Alzoba (FAITID): I think we might see this particular part of PDP mentioned in next GAC communique
George Kirikos: Paul M: that's one possible solution, but we should have a thorough review of all possible solutions, to find the best one for all stakeholders.
Jeff Neuman: @Phil - and if we can establish that the standard is actually the reason behind no one using it, and we find that the lack of use of the URS is actually a problem, then yes we can look at the standard
George Kirikos: Setting aside the URS decision is equally "simple", to compel the case in court.
Paul McGrady: @George - I agree. It is only one solution - it just happens to be an easy one that will work. But, I agree, we have to talk through all the other options which may or may not be as easy and may or may not work.

Jeff Neuman: but there should be hurdles to cross before re-litigating issues that were discussed and handled in 2009 - 2012 simply because we did not like the way they came out back then
WIPO - Brian Beckham: To question 1 here, there are already sanctions built in to the mechanism itself.
Paul Tattersfield: Do we need to add a question to see if we should put in provisions for the publishing of a list of any abuse of filing determinations?
Philip Corwin: @Jeff--I personally don't think the evidentiary standard is a reason for the relatively low use of URS, but we can delve into that as our work continues
Kristine Dorrain - Amazon Registry Services: @Paul T, that's already in there.
WIPO - Brian Beckham: To question 2 here - presumably (noting my comment on questoin 1) this is meant to address repeat registrant (not brand owner) offenders)?
Paul Tattersfield: Thanks Kristine
Paul McGrady: @George, just to clarify, agreeing with "Paul M: that's one possible solution, but we should have a thorough review of all possible solutions, to find the best one for all stakeholders." and not "Setting aside the URS decision is equally "simple", to compel the case in court." The latter would be an exception that swallows the whole of the URS. All a losing respondent would need to do is push the "reject" button and the complainant would be stuck with Court action, which deprives the complainant of the benefits of the URS. So, nope to that.
Kristine Dorrain - Amazon Registry Services: @ Brian...does it feel like deja vu?
Susan Payne: NEUTRALITY
WIPO - Brian Beckham: To question 3 here - where was it agreed/stated that it was ICANN's job to train registrants on URS defenses?
Susan Payne: @Brian - yes as discussed in AD, Q2 is repeat offender registrants
Mary Wong: @Brian, that is a consequence of basically importing community-suggested questions wholesale
Justine Chew: Interestingly, the question on use of English-only is preceded with "What evidence is there of problems ...."
Susan Payne: @Brian - quite
Maxim Alzoba (FAITID): there are 2 sides of URS abuse (by the abusive registrants and by the party abusively claiming in URS that the name was used)
WIPO - Brian Beckham: To question 4 here - the IRT and STI looked at these - do we have any benefit of the "legislative history" on this from them?
Kristine Dorrain - Amazon Registry Services: I reiterate my point in AD that the first bullet should have lower case "arbitration forums".
Jeff Neuman: Brian - which question 4?
WIPO - Brian Beckham: On slide 4/5, as I stated in Abu Dhabi, this question should be stricken as it goes to the UDRP (and is not timely, given WIPO's revised Jurisprudential Overview since 2015).
George Kirikos: More on next slide, actually.
Griffin Barnett: For the last question on this slide, we might say "What changes, if any, may be needed to ensure..."
Griffin Barnett: Current wording seems to presuppose a problem
WIPO - Brian Beckham: @Jeff slide 3/5 (as to Q4)

Phil Marano: @Brian, support striking the question as outdated and not relevant to the URS.
J. Scott: @George and all. We have to identify a problem before we can recommend a solution.
Jeff Neuman: On this one, I will note that there was a GNSO Policy Recommendations that the Providers be "under contract" with ICANN.....I want to know why that was not implemented
Mary Wong: @Jeff, we can check but I believe all URS providers have a MOU with ICANN
George Kirikos: Here's the context for NAF:
https://en.wikipedia.org/wiki/Forum_(alternative_dispute_resolution)#Legislation_and_lawsuits_against_NAF
J. Scott: Do we have any evidence the Forum has not effectively run the URS or their is some type of identifiable bias?
Philip Corwin: @Jeff--it was implemented to some extent; ICANN entered into an MOU with all URS providers
J. Scott: ^*there*
Philip Corwin: So the MOU essentially turns URS providers into a new species of contracted party, raiisng the issue of whether ICANN has or should engage in compliance efforts
Paul Tattersfield: it would be a shame to restrict the breadth of the questions at an early stage
Paul McGrady: +1 Susan. RPM Providers are not RPMs.
Cyntia King: Agreed, Susan
Rebecca L Tushnet: How would the evidence come to light if we don't look for it? And isn't compliance relevant to whether the RPMs are "working"?
claudio: agree, unless provider is acting inconsistent with policy, there is nothing for us to review
Cyntia King: Policy & execution of poicy by vendors are separate issues
claudio: I looked at GNSO recommendations and didn't see that
Rebecca L Tushnet: Some policies don't execute as well as others.
claudio: the Business Constituency raised that issue, but don't think its in GNSO policy recommendations
George Kirikos: Provider accountability goes to the heart of the legitimacy of the policy.
claudio: here is link to GNSO policy recommendations: https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm
Paul Tattersfield: The problems are heighten when there are egregious determinations
Rebecca L Tushnet: +1 Kathy: when the issue was whether indications of origin were covered, we were very interested in implementation v. policy.
Rebecca L Tushnet: (I am too, by the way!0
Berry Cobb: The MOUs can be found on the microsite:
https://newgtlds.icann.org/en/applicants/urs
claudio: the only relevance of Providers that I see is whether they are implementing the RPM in way that is consistent with the URS, everything else that may be MOU seems out of scope
John McElwaine: What is forum shopping?
claudio: there is only one forum for URS
Maxim Alzoba (FAITID): 3
Kristine Dorrain - Amazon Registry Services: There are three
claudio: right?

George Kirikos: @John: see http://www.michaelgeist.ca/2002/03/domain-dispute-bias-goes-from-bad-to-worse/
WIPO - Brian Beckham: On slide 5/5, I don't fully understand bullets 2 and 4
claudio: Ok thanks, Kristine
Cyntia King: Most companies create policy then have an implementation team look at how new & existing rules are absorbed into the ecosystem.
Mary Wong: @Brian, again, these are verbatim from community suggestions and staff can go back to retrieve information about the specific comment period/issue for which they were provided as community input.
Paul Tattersfield: no it doesn't it might be no changes are required
Michael R Graham: @Paul +1 -- especially as to biased questions.
George Kirikos: PaulT is right, the answer might be "none".
George Kirikos: Not biased at all.
John McElwaine: @George I reviewed that articvle and that is not forum shopping in the technical sense.
George Kirikos: @John: it's shopping the providers. to the extent that each provider is a different forum (due to supplemental rules, or different panelists), then it is forum shopping.
Kristine Dorrain - Amazon Registry Services: I wonder if practices have changed since 2002?
Jeff Neuman: @George, to point out the obvious, that article is over 15 years old
Kristine Dorrain - Amazon Registry Services: ^More direct
George Kirikos: @Jeff: that doesn't take away from its truth, though, Jeff.
WIPO - Brian Beckham: On Slide 5/5, bullet 3, is this a requirement under the MOU or Policy itself?
Mary Wong: Note that URS is not consensus policy
J. Scott: @Jeff. Thank you. I thought that issue had died with the dinosaurs.
Jeff Neuman: @Mary - you are correct...but in order to change the URS and have it applicable to all existing registries, those changes must be :)
Michael R Graham: If studies are cited, please ensure they are both relevant to the CURRENT discussion, and both current and supported.
John McElwaine: @George - I get your point. But forum shopping has nothing to do with provider selection and it causes me to question bias of the article. Here's the definition of forum shopping https://www.law.cornell.edu/wex/forum_shopping
Jeff Neuman: So....the URS was not established by Consensus Policy....but all changes to the URS do need to be established by Consensus Policies in order for them to apply to existing registries
George Kirikos: @John: still consistent with that definition.
WIPO - Brian Beckham: On Slide 9, bullet 4, this raises a question I raised on several occasions concerning moving the URS to phase 2 as it is meant to be a complement to the UDRP; discussing them seperately is something of a fiction
Mary Wong: @Jeff, understood - just thought it may be helpful esp for newer participants when we (perhaps informally) refer to "policy" :)
John McElwaine: @George - not to a laywer
claudio: if we need to answer these many URS questions, it may make sense to eventually start using Subteams

David McAuley (Verisign): thanks all, good bye
claudio: thanks all
Philip Corwin: First we need to come up with final list of refined questions